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Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1395

GRAYCE E. CAROLLO, PETITIONER,

versus

S. S. KRESGE COMPANY, D/B/A K-MART,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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GRAYCE E. CAROLLO, Petitioner,

versus

S. S. KRESGE COMPANY, D/B/A K-MART,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner prays that a Writ of Certiorari issue to review the decision and Judgment of the United States Court of Appeals for the Fourth Circuit, dated and entered in this case on the 6th day of March, 1972.

OPINIONS BELOW

The District Court filed no opinion. The opinion of the Court of Appeals (App. 19.) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 6, 1972. The jurisdiction of this Court is invoked under the provision of 28 U. S. C., section 1254.

QUESTIONS PRESENTED FOR REVIEW

1. Where, because of the ruling of the District Court, there is no occasion in the trial of a case for a plaintiff to introduce evidence of material facts in conflict with those produced by defendant on the issue of an affirmative defense, does a Court of Appeals, in reversing a judgment for plaintiff on such issue, have the power also to direct entry of judgment for defendant?

2. Whether, in a federal diversity case, either a Court of Appeals or a District Court has the power to decide factual issues arising from conflicting evidence or conflicting inferences from undisputed facts where according to the state practice such issues are decided by the trial judge, and not by a jury, subject to review by the appellate court?

3. May a Court of Appeals reverse the action of a trial judge dismissing an affirmative defense where the evidence adduced by defendant in support of such defense is legally insufficient to warrant the submission of the issue of such defense to the jury?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment VII.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

28 U. S. C. 2106.

"The Supreme Court or any other Court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Title 72, Workmen's Compensation, Code of Laws of South Carolina, 1952.

"Sec. 72-111. **Liability of owner to workmen of subcontractor.**

When any person * * * referred to as 'owner', undertakes to perform or execute any work which is part of his trade, business or occupation and contracts with any other person (* * * referred to as 'subcontractor') for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work and compensation under this Title which he would have been liable to pay if the workman had immediately been employed by him."

"Sec. 72-121. **Employee's rights under Title exclude all others against employer.**

The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee * * * as against his employer, at common law or otherwise, on account of such injury, loss of service or death."

"Sec. 72-101. **When acceptance of provisions presumed.**

Every employer and employee * * * shall be presumed to have accepted the provisions of this Title respectivley to pay and accept compensation for personal injury or death by accident arising out of and in the course of his employment and shall be bound thereby * * *."

STATEMENT OF CASE

This case is of remarkable similarity to *Byrd v. Blue Ridge Rural Electric Co-operative, Inc.*, 356 U. S. 525 which was decided by this Court in 1958.

Petitioner, a resident of South Carolina, brought suit against S. S. Kresge Company, d/b/a K-Mart, a Michigan Corporation, to recover damages for negligence in failing to exercise due care in the maintenance of a portion of its premises used in common by lessees thereof, as the result of which the petitioner fell on a slippery floor and sustained permanent crippling injuries. At the time of her injuries, petitioner was employed as the manager of a retail millinery business operated by a corporation known as Kraft, a lessee of space in respondent's premises where space was also leased to other businesses, and the remaining portion occupied by repondent for the conduct of its own business of retail sales.

* * *

Respondent answered and set up as one of its defenses that petitioner's remedy was exclusively under the South Carolina Workmen's Compensation Act, Sections 72-111 and 72-121, for the reason that petitioner at the time of her injury was engaged in work which was part of the trade, business and occupation of respondent.

The undisputed evidence of record is that respondent was not, at the time of petitioner's injuries or at any time

prior thereto, in the business of buying and selling millinery goods and merchandise, and that its employees never performed the work of buying and selling at retail millinery goods and merchandise or of managing any such business—work which petitioner was performing at the time of her injury.

The evidence of record further shows that the lessee Kraft, petitioner's employer, rented space from respondent who also agreed to furnish the lessee certain equipment, utilities and janitorial service. Under the lease agreement, it was expressly provided that the lessee shall be responsible for claims for damages resulting from the sale of its products or for personal injuries resulting from the negligence of the lessee.

The testimony according to the reporter's transcript and appendix included as part of the record on appeal in the Court below further shows that petitioner and the employees working under her supervision were paid directly by Kraft and not by respondent, nor did the respondent reimburse Kraft for such wages (Tr., 1, p. 206, Ls. 3-4, p. 285, Ls. 5-9, App., 62, 62);[1] that petitioner was hired by Kraft and the employees working under her supervision were hired by her and not by respondent (Tr., 1, p. 204, Ls. 11-18, p. 207, Ls. 23-25, p. 208, Ls. 1-21, App., 63); that the petitioner priced all merchandise for sale according to directions from Kraft and not from respondent (Tr., 1, p. 206, l.21.25, p. 207, Ls. 1-9, App., 50, 62); that petitioner ordered the millinery merchandise through Kraft, and respondent had nothing to do with the ordering of the merchandise (Tr., 1, p. 210, Ls. 11-25, App., 65); that the petitioner and the employees under her had separate time cards which were kept under petitioner's supervision and not by respondent (Tr., 1, p. 211, Ls. 14-23, App., 65, 66);

[1] References are to Reporter's Transcript (Tr.) and Appendix (App.) included in the Record in the Court of Appeals.

that vacation time for petitioner and the employees working under her were determined solely by Kraft (Tr., 1, p. 214, Ls. 17-21, App., 68); that the books and records of Kraft were maintained by petitioner who submitted them to Kraft and not to respondent (Tr., 1, p. 210, Ls. 11-25, p. 211, App., 67); that petitioner and the employees under her supervision did not and were not required to attend sales meetings of respondent's personnel and employees (Tr., 1, p. 285, Ls. 18-23) and that all incoming freight of Kraft's merchandise was handled solely by petitioner except on infrequent occasions when she required help to carry the freight to the Kraft storage area (Tr., 1, p. 190, Ls. 4-24, App., 51); and a separate stock room was kept by Kraft under its own lock and key (App., 51).

In view of absence of facts which were present in the South Carolina case of *Adams v. Davison-Paxon Company*, 230 S. C. 532, 96 S. E. (2d) 566, which held that a factual issue was presented therein, the petitioner, at the conclusion of respondent's case and before her case in reply, tested the legal sufficiency of respondent's evidence as to the issue of the affirmative defense by moving to dismiss the defense. The Honorable J. Robert Martin, Jr., United States District Judge, before whom the case was tried, with a jury, requested whether petitioner had any reply testimony to which the response was that if the motion were denied reply testimony would be offered.

Before Judge Martin ruled on the motion, respondent moved for a directed verdict on this issue. After hearing argument, Judge Martin granted petitioner's motion to dismiss and denied respondent's motion for a directed verdict, whereupon petitioner rested her case.

The case was then submitted to the jury on the issue of negligence, contributory negligence and damages, after which the jury brought in a verdict of $10,000.00 in favor of petitioner.

Respondent moved for judgment N. O. V. (but not for new trial) on all issues and petitioner moved for a new trial on the ground of inadequacy of damages. Judge Martin denied respondent's motion and granted petitioner's motion for new trial, limited to the issues of negligence, contributory negligence and damages. At the second trial the jury brought in a verdict for $20,000.00 in favor of the petitioner. Motion for partial new trial was made by petitioner on the ground of inadequacy of damages and the respondent also moved for judgment N. O. V. as to the issues of negligence and contributory negligence. Both motions were denied.

Respondent appealed from the refusals of District Judge J. Robert Martin, Jr., who presided at the first trial, and District Judge Donald Russell, who presided at the second trial, to grant respondent's motions for Judgment N. O. V., and petitioner cross-appealed, in *forma pauperis*, from the refusal of District Judge Donald Russell to grant a partial new trial limited to the issue of damages.

Upon appeal, the Court of Appeals reached a factual finding, from its own view of the testimony, that the evidence was sufficient to support a finding that the business of petitioner's employer, Kraft, was part of the trade, business and occupation of respondent. The Court, therefore, reversed the District Court's judgment.

The Court of Appeals did not stop there, however. The respondent not having moved for a new trial either in the District Court or upon appeal, the Court of Appeals, relying upon *Adams v. Davison-Paxon Company*, 230 S. C. 532, 96 S. E. (2d) 566, as being "indistinguishable" and controlling, assumed to resolve the conflicting inferences and determined the ultimate fact therefrom that Kraft's millinery business managed by petitioner was part of the trade, business and occupation of respondent; and thus undertook the power of not only reversing the ruling of the District

Judge, but also remanding the case with direction to enter judgment for respondent.

REASONS FOR GRANTING THE WRIT

1. **The decision by the Court below is not in accord with the applicable decisions of this Court:**—The issues in this case are (1) whether a Court of Appeals has the power to deny a party the opportunity of presenting testimony which he had no occasion to present at the trial because of the ruling of the District Judge, by directing entry of Judgment for the opposite party upon reversing the ruling of the District Judge; (2) whether a Court of Appeals has the power to weigh conflicting inferences in a diversity case by reason of the fact that such power is vested in the State courts by the state practice; and (3) whether a Court of Appeals may reverse the action of a District Judge dismissing an affirmative defense where the evidence is legally insufficient to support such defense.

On the first issue the decision of the Court below is in conflict with the holding of this Court that it is beyond the legitimate function of an appellate court, in reversing the ruling of a District Judge, to deprive a party of the right to controvert material facts and have a trial on the merits, by directing judgment against him, where such party had no occasion to dispute or controvert the material facts of the opposite party because of the ruling of the District Court declared erroneous by the Court of Appeals.

Weade v. Dickmann, Wright & Pugh, 337 U. S. 801;
Fountain v. Wilson, 336 U. S. 681;
Kaku Nagano v. McGrath, 342 U. S. 916;
Byrd v. Blue Ridge Rural Electric Co-operative, Inc., 356 U. S. 525.

In each case the question before this Court was whether the appellate court could order judgment for a

successful appellant on an issue as to which the opposite party had no occasion in the trial court to produce evidence or controvert the material facts of the successful appellant.

The rationale of the foregoing cases applies with equal force to the instant case which presents the same important general problem. Petitioner's motion to dismiss the affirmative defense before her reply case was based upon the particular legal theory that the evidence of respondent in support of its affirmative defense was legally insufficient to support a verdict for respondent on this defense and consequently did not warrant the presentation of any reply testimony by petitioner on the issue of such defense. This motion was granted, and, therefore, not only was there a lack of occasion to controvert respondent's testimony on this issue, but any further testimony on this point would have been superfluous and would have transgressed the ruling of the District Judge. The action of the District Judge in disposing of this issue at the first opportunity which in his opinion was appropriate and in accord with the rights of the parties was in consonance with the spirit of our federal procedural law as expressed in Rule 1 of the Federal Rules of Civil Procedure that there shall be a "just, speedy and inexpensive determination of every action."

The true effect of the holding of the Court below would be to deprive a party of the opportunity to present controverting evidence and the right to a jury trial at the risk of successfully challenging the legal sufficiency of an opponent's case and consequently add to the time and expense of the orderly administration of justice. Moreover, it would be violative of the 7th Amendment to the Constitution which was not framed nor adopted to deprive a party of either the right to a jury trial or of the right to challenge the legal sufficiency of the opponent's case. "The

Amendment is impartial in the guaranty of both." *Galloway v. U. S.*, 319 U. S. 372, 393.

Also the decision of the Court below directing entry of judgment for defendant is not an "appropriate" judgment which was "just" under the circumstances, and therefore not authorized by 28 U. S. C. 2106. *Bryan v. U. S.*, 338 U. S. 552.

The allowance of the petition in this case would afford this Court the opportunity to review and resolve the problems involved herein on an important question of federal procedural law and appellate review

2. **The action of the Court below constituted an invasion of the province of the jury contrary to the 7th Amendment to the United States Constitution:**—The Court below, in reversing, undertook to direct entry of judgment for respondent under the assumption that "the decision of the South Carolina Supreme Court in *Adams v. Davison-Paxon Company*, 230 S. C. 532, 96 S. E. (2d) 566 (1957) is indistinguishable and that it controls the decision here". Petitioner challenges both the assumption and the power of the Court below. She submits that there was an absence of facts in the instant case which presented a factual issue in the *Adams* case. Moreover, if, as the Court of Appeals concluded, the absence of such facts was immaterial, at the least, in accordance with the decision in the *Adams* case the evidence presented a factual issue of whether respondent was engaged in the millinery business so as to invoke the basic defense of the South Carolina Workmen's Compensation Act.

That it would be an undue invasion of the jury's historic function for an appellate court to weigh confleting inferences and conclusions that may be drawn from the evidence or undisputed facts is an established rule of judicial review.

Byrd v. Blue Ridge Rural Electric Co-operative, Inc., 356 U. S. 325;
Wilkerson v. McCarthy, 336 U. S. 53;
Lavender v. Kurn, 327 U. S. 645;
Sartor v. Arkansas Natural Gas Corp., 321 U. S. 621;
Tennant v. Peoria & Pekin Union R. Co., 321 U. S. 29.

The identical question in the instant case was before this Court in *Byrd v. Blue Ridge Rural Electric Co-operative, Inc., supra*. There, this Court pointed out that according to the leading South Carolina case on the subject, *Marchbanks v. Duke Power Co.*, 190 S. C. 336, 2 S. E. (2d) 825, the determination of the affirmative defense in question here "is in each case largely a question of degree and of fact". This Court also pointed out in clear and unequivocal language that the facts in the *Adams* case which the Court below characterized as "indistinguishable" from those in the instant case, presented a factual issue according to the decision of the South Carolina Supreme Court, the language of which this Court quotes in *Byrd*, 356 U. S. at pages 533 and 534, as follows:

> "A question is also presented as to whether on remand the factual issue is to be decided by the judge or by the jury. The respondent argues on the basis of the decision of the Supreme Court of South Carolina in *Adams v. Davison-Paxon Co.*, 230 S. C. 532, 96 S. E. (2d) 566, that the issue of immunity should be decided by the judge and not by the jury. That was a negligence action brought in the state trial court against a store owner by an employee of an independent contractor who operated the store's millinery department. The trial judge denied the store owner's motion for a directed verdict made upon the ground that § 72-111 barred the plaintiff's action. The jury returned a verdict for the plaintiff. The South Carolina Supreme Court reversed, holding that it was for the judge and

not the jury to decide on the evidence whether the owner was a statutory employer, and that the store owner had sustained his defense. The court rested its holding on decisions, listed in footnote 8, *infra*, involving judicial review of the Industrial Commission and said:

> 'Thus the trial court should have in this case resolved the conflicts in the evidence and determined the fact of whether . . . [the independent contractor] was performing a part of the trade, business or occupation' of the department store-appellant and, therefore, whether . . . [the employee's] remedy is exclusively under the Workmen's Compensation Law.' 230 S. C., at 543, 96 S. E. (2d) at 572."

Notwithstanding that the state practice requires the factual issue to be decided by the court, this Court made it clear that, contrary to the holding of the Court below, the state practice does not control, and that "under the influence—if no the command—of the Seventh Amendment," decisions of disputed questions of fact are assigned to the jury, *Byrd v. Blue Ridge*, *supra*, at page 537.

Therefore, assuming, *arguendo*, that the evidence was sufficient to create a factual issue, it is respectfully submitted that the Court below, by substituting its own view of the case for that which should be determined by a jury, has invaded the province of the jury, contrary to the rights of the petitioner under the Seventh Amendment to the United States Constitution.

3. **The action of the Court below, in reversing the ruling of the District Judge dismissing the affirmative defense, is inconsistent with applicable federal procedure and contrary to the applicable state law:**—The action of the Court below in reversing the ruling of the District Judge dismissing the affirmative defense is in direct conflict with the holding of this Court that where a party having the affirmative of an issue has the occasion and the opportun-

ity to produce evidence on such issue but the evidence produced thereon is legally insufficient to support the burden of the party's proof, such issue should be withdrawn from the consideration of the jury.

Galloway v. United States, 319 U. S. 372.

The Court below, in holding that the evidence was sufficient to support the affirmative defense, relied upon the South Carolina case of *Adams v. Davison-Paxon, supra.* It appears, however, that the facts in the cited case are distinguishable from those here. In the cited case the evidence showed that the defendant store owner's agreement contained no provision for a minimum rental; the designated space, size and location of the millinery department were determined **solely** by the defendant store owner; the injured employee was employed subject to the approval of the store owner; the injured employee considered herself to be an employee of the store owner; and the store owner absorbed the losses on all uncollectible accounts for millinery as with other sales on credit.

The evidence clearly shows that none of the aforementioned facts or other elements of control by the store owner were present in the instant case. Moreover, the evidence, pertinent to the issue of the affirmative defense here,[2] conclusively showed that the respondent never was employed in the millinery business, nor was its direct employees ever engaged in performing the work of buying or selling millinery. Thus, this left the record with no evidence upon which a finding could be made that respondent was engaged in the millinery business so as to warrant the application of the South Carolina Workmen's Compensation Act. The District Judge so considered it and thus it

[2] *Byrd v. Blue Ridge Rural Electric Co-operative,* 356 U. S. 525 at page 529.

became his duty, in accordance with applicable federal law, to withdraw the issue from the jury.

Moreover, the panel of the Court below which rendered the decision herein, not having among its members a South Carolina lawyer, in not only reversing the action of the Chief District Judge dismissing the affirmative defense but also directing entry of judgment for defendant on this defense, contrary to the accepted and usual course of judicial review, did not give due weight to the judgment of the District Judge on the question of local law of a state in which the District Judge was an outstanding and able lawyer of long experience who had served in the South Carolina legislature and as a State Circuit Judge for eighteen years and had sat as an acting Associate Justice of the State Supreme Court. *Bernhardt v. Polygraphic Company of America,* 350 U. S. 198; *Standard Brands v. Bateman,* 184 F. (2d) 1002 (C. A. 8), cert. den., 340 U. S. 942. Appellate courts should be slow to impute to trial courts a want of perspicacity in determining the local law, and, as stated in headnote I, *Nordin v. May,* 208 F. (2d) 131 (C. A. 8), "where question to be determined involved application of state law, which, at best, was at least uncertain on the subject, Court of Appeals on appeal would defer to judgment of Federal District Court concerning the state law."

The issue raised under this heading involves an important question of federal appellate review on which the decision of the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a Writ of Certiorari, should reverse the judgment of the Court below and remand the case to the Court of Appeals for the decision of the undecided question presented by petitioner on her cross-appeal as to a partial new trial for damages only, with instructions that, if such question is decided adversely to petitioner, the Court of Appeals should affirm the judgment of the District Court.

Respectfully submitted,

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